In The

Supreme Court of the United States

No. 77-522

WALTER J. DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

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No. .....

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Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Middle District of North Carolina.

OPINIONS BELOW

There was no opinion by the United States District Court for the Middle District of North Carolina. The opinion of the Court of Appeals for the Fourth Circuit is

not officially reported. Its opinion is annexed hereto in an Appendix (Appendix 1a-5a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1977.

The Court of Appeals denied the Petition for Rehearing on September 7, 1977.

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the evidence is legally sufficient to sustain the convictions of petitioner on one count of conspiracy to misapply funds and make a false entry, on two counts of willful misapplication of federally insured funds, and on a final count of making a false entry within the purview of 18 U.S.C. 1006.

II. Whether the evidence admitted against petitioner under the conspiracy count together with the inadequacy of the District Court's instructions thereon amounted to a prejudicial variance so as to deprive petitioner of his fundamental right to a fair trial.

STATUTES INVOLVED

Title 18, United States Code:

Section 2(a)

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Section 2(b)

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

* * *

Title 18, United States Code:

Section 371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

* * *

Title 18, United States Code:

Section 657

"Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owner's Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting

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Citations to record and appendices in the petition have been abbreviated as follows:

Appellant's Appendix in Court of Appeals—AT. A.

through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

* * *

Title 18, United States Code:

Section 1006

"Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Corporation, or any small business investment company, with intent to defraud

any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange mortgage, judgment or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Walter J. Dozier is and has been the President of a real estate brokerage firm in Durham, North Carolina, known as Gregory Real Estate Company. Walter J. Dozier was indicted with five other defendants on August 2, 1976, in the United States District Court for the Middle District of North Carolina. Four of the six defendants, namely, Walter Archibald Biggs, C. Thomas Biggs, Thomas C. Upchurch, and John S. Stewart were at all material times officers and directors of a federally insured savings and loan association. John S. Stewart was the President and a director of Mutual Savings and Loan Association of Durham. Walter A. Biggs, C. Thomas Biggs and Thomas C. Upchurch were officers and directors of Home Savings and Loan Association of Durham, North Carolina. The sixth defendant, C. Paul Roberts, was a large contractor and

developer of residential property in the Durham community.

Jurisdiction was invoked in the United States District Court pursuant to the provisions of Title 18, United States Code, sec. 657 and sec. 1006, pertaining to the conduct of officers and employees of savings and loan associations, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. The seventeen count indictment charged the six defendants with violations of 18 U.S.C. 657, 18 U.S.C. 1006, 18 U.S.C. 2, and 18 U.S.C. 371. Count One of the indictment alleged a broad conspiracy to violate the foregoing statutes on misapplication of federally insured funds and false entries. The indictment covered the period from July 27, 1972, to January 21, 1975.

Walter J. Dozier and John S. Stewart pleaded not guilty to the respective charges against them and were tried separately by juries in the United States District Court, Durham Division, sitting in Greensboro, North Carolina. Each of the other defendants entered a guilty plea to one of the offenses alleged against them. Petitioner Dozier was charged in the conspiracy count (Count One), in Courts Two and Three with a violation of 18 U.S.C. 657 and 2, and in Count Eleven with a violation of 18 U.S.C. 1006 and 2. Petitioner's trial lasted the week of September 20, 1976, with Petitioner being adjudged guilty on the four counts involving him. Sentencing in the District Court occurred on December 6, 1976, with Petitioner being sentenced to a term of imprisonment of three years and a fine of $5,000.00 on Counts One and Two, and a term of two years and $5,000.00 on Counts Three and Eleven, with the sentences to run concurrently.

This case develops from a sale of a large tract of real property in the southeast portion of Durham, North Carolina, comprising approximately one hundred seventy-five acres. The property had been owned for years by Durham Industrial Development Corporation, which company de-

cided to sell the property in 1972 for land development. The entire tract was sold in July of 1972 to Homeco, Inc., a wholly owned subsidiary of Home Savings and Loan Association. The tract which was known as "Southeast Park," Government Exhibit #2, was bought for $353,260.00; however, Home Savings and Loan Association financed the purchase by its loan, number 20270, on July 27, 1972, to Homeco, Inc. in the amount of $435,000.00. (At. A. pp. 217, 218)

C. Paul Roberts had been interested in a possible purchase of the property. One of Mr. Roberts' companies, G. H. Investment Company, Inc., was identified on Government Exhibit #2 as the owner-developer of Southeast Park. Other evidence showed that funds not needed for the purchase by Homeco, Inc. were used to pay for surveying, engineering, and other preliminary improvement work that had been commenced on the property under the direction of developer, C. Paul Roberts.

Homeco, Inc. employed C. Thomas Biggs, a practicing attorney and an officer of Home Savings and Loan Association, to rezone a forty (40) acre portion of the property into an RG or multi-family area. Mr. Biggs testified that although he was employed by Homeco, Inc. he had many conversations with C. Paul Roberts about his progress in the zoning matter. The zoning work was successfully completed in October, 1972, with the project being divided into a single family home area identified as Bacon Street and a multi-family or four-plex apartment unit area identified as Hearthside Street. (At. A. pp. 138, 139)

C. Thomas Upchurch, an original co-defendant who pleaded guilty to one of the charges, testified that developer C. Paul Roberts was approaching his lending limit at Home Savings and Loan Association. (At. A. pp. 87, 97) Mr

Upchurch was unable to testify what the limit for Mr. Roberts was or how close Mr. Roberts was to the limit. Mr. Upchurch testified that there was a Federal Home Loan Bank regulation which required that an individual or a company in which he is a ten percent or more owner can only borrow a certain amount dependent on the total savings and reserves of the federally insured savings and loan association. No evidence was introduced on what the assets and reserves of Home Savings and Loan Association were during late 1972 and 1973.

Petitioner's involvement in this prosecution on Counts One, Two and Eleven stems from a purchase and construction or development loan that Gregory Real Estate Company obtained in order to purchase and develop the single family area of Southeast Park comprising 99.52 acres. On November 6, 1972, the Gregory Real Estate Company applied at Home Savings and Loan Association for a purchase and development loan in the face amount of $1,200,000.00. The proceeds of the loan were to buy the acreage intended for the single family units of "Southeast Park," and, subsequently, for the construction and development of approximately three hundred residential home sites including the necessary clearing, grading, installation of curb, gutter, water, sewer and other utility improvements that would be necessary to develop and market homes for sale. This loan was closed on November 13, 1972. Following recordation of the deed from Homeco, Inc. to Gregory Real Estate Company. Gregory executed the first deed of trust securing Home Savings and Loan Association in the amount of $1,200,000.00. A government witness, Mr. Herman Hinnant, had appraised the property secured on a developed lot basis for $5,700,000.00. (At. A. p. 359)

The evidence established that following the execution of the Gregory Real Estate Company Note and first deed

of trust, which instruments were signed by Walter J. Dozier as President, Home Savings and Loan Association required the execution of an affidavit, the purpose of which was a certification that no mechanics or materialmen's liens would supersede the lien of the recorded first mortgage. The affidavit entitled "Contractor's Affidavit" was executed by Gregory Real Estate, and signed by Walter J. Dozier as President. (At. A. p. 361) It is this affidavit which is the subject of the Petitioner's conviction under Count Eleven of the indictment. The lien waiver affidavit that is known as Government Exhibit 32-A is dated November 13, 1972; it is the only waiver in the loan file despite the series of construction loan advances that occurred over the three year term of the loan.

Government Exhibit 33 contains a disbursement summary for the successive advances under this loan. In November, 1973, there had been seventeen separate advances amounting to a total of $575,300.00, including the initial land acquisition costs for the 99.52 acres in the approximate amount of $300,000.00. Interest payments were made by Gregory Real Estate Company. See Government Exhibit 44, 42. By February 1, 1974, the advances amounted to $597,800.00 and the property had been improved by the construction of water, sewer, clearing and grading.

The United States established that the contractor in fact for the development of the property was co-defendant C. Paul Roberts operating through his corporate entity, Empire Properties, Inc. Gregory Real Estate Company was and is a real estate brokerage firm that was not in the construction business. Certain funds that were disbursed under the construction and development loan to Gregory Real Estate Company were traced into Triangle Nursing Home, a Paul Roberts Company. Government Exhibit 27,

an initial disbursement check in the amount of $131,388.50 on November 13, 1972, was combined with other deposits, making a total deposit of $181,141.90, from which $75,-000.00 was traced into Triangle Nursing Home.

Over the three year term of the loan, total disbursements amounted to approximately $858,000.00. Certain principal curtailments were made when the first houses were sold in 1975. The loan was not extended at the expiration of the three year term, foreclosure was begun in February, 1976, with Home Savings and Loan Association buying the property at foreclosure for $566,370.00. A subsequent civil suit was brought in the state court against Gregory Real Estate Company seeking a judgment for the alleged deficiency of approximately $188,000.00.

The record establishes that although Gregory Real Estate Company was not a developer or contractor, the firm had been a significant and established borrower of real estate mortgage funds at Home Savings and Loan Association and at other lending institutions. Government Exhibit 22, the minute book of the Board of Directors meetings of Home Savings and Loan Association, reveals the existence of a series of short term loans for eighteen months in the amount of approximately $232,900.00 following the loans involved in this case. See Government Exhibit 22 at page 154. The short term loans made to the Gregory firm occurred in June and July of 1973. On November 19, 1973, the Board of Home compiled a list of bad debtors and omitted any reference to Gregory Real Estate Company or Walter J. Dozier. Government Exhibits 38 and 39 are financial statements of Gregory Real Estate Company. These statements demonstrate a net worth in the Gregory company of approximately $320,000.00. There was no evidence that any concealment or subterfuge was employed by the Gregory firm in order to obtain any loan.

The second phase of the development of "Southeast Park" began in the spring of 1973 when the multi-family or four-plex apartment area comprising forty acres of the original tract became the subject of the construction of thirty-four apartment units, each of which units was financed by a construction loan in the amount of $32,000.00. Home Savings and Loan Association financed the construction of twenty-seven units by making twenty-seven loans, each in the amount of $32,000.00 and each secured by a Note and first mortgage. Mutual Savings and Loan Association of Durham financed seven of the units, each for $32,-000.00, with five of the Mutual loans being made to Thomas C. Upchurch, a Vice President of Home Savings and Loan, and two Mutual loans being made to Durham Rental and Investment Company, the said company being owned by Walter A. Biggs and C. Thomas Biggs, also officers and directors of Home Savings and Loan Association. Similarly, seven of the twenty-seven loans made by Home Savings and Loan were made to officers and directors of Mutual, five loans being made to Majaja Corporation, whose President was co-defendant, John S. Stewart, with one loan each being made to F. V. Allison and Josephine Strayhorne, officers of Mutual Savings and Loan Association.

Twelve of the twenty-seven Mutual loans between March 22, 1973, and April 6, 1973, were made to relatives of C. Paul Roberts, each in the amount of $32,000.00 and each containing the same terms. One loan was made to Eric Kyles, an employee of Empire Properties, Inc., a corporation owned by C. Paul Roberts. Three loans were made to Jerry M. Davis, a son-in-law of C. Paul Roberts, two loans were made to Donald Gene Roberts, a son of Paul Roberts, three loans were made to Timothy E. Oates, a son-in-law of Paul Roberts, and four loans were made to Bryant B. Roberts, a brother of Paul Roberts. False employment in-

formation was inserted on the loan applications of Donald Gene Roberts, Timothy E. Oates, and Jerry M. Davis. S. Eric Kyles, an employee of Roberts, admitted filling out the loan applications reciting that the borrowers were employed, whereas in fact, the applicants were full time students. (At. A. pp. 177, 178) Detailed testimony concerning the making of these various and fraudulent loans was admitted into evidence against Petitioner over his objection. (At. A. p. 180)

Gregory Real Estate Company obtained seven mortgage loans from Home Savings and Loan Association. Government Exhibits 13 and 14 contain the loan files for the Gregory four-plex loans. Four of the seven loans are the basis of the charges contained in Count Three of the indictment. Those mortgage loans were made in April, 1973, and were assumed by John M. Wheeler, President of Mechanics and Farmers Bank in the fall of 1973. It is uncontradicted that the general contractor for the construction of all thirty-four apartment units was C. Paul Roberts operating through his corporate entity, Empire Properties, Inc. All the units were eventually constructed and the evidence did not reveal that any loan was delinquent at the time of trial.

Thus, the involvement of Petitioner in four counts of the seventeen count indictment arises because of the Gregory Real Estate Company's participation in one large and four small real estate mortgages. Petitioner has been convicted of criminally misapplying the funds of Home Savings and Loan Association in violation of 18 U.S.C. 657, of making a false entry within the purview of 18 U.S.C. 1006 by executing the affidavit on mechanics liens in connection with the closing of the large development mortgage, and of conspiracy to violate 18 U.S.C. 657 and 18 U.S.C. 1006 (18 U.S.C. 371). It is clear that petitioner was never at any

time an officer or employee of any federally insured savings and loan association, and that his convictions must be sustained under 18 U.S.C. 2 as an aider and abettor.

REASONS FOR GRANTING THE WRIT

The evidence produced in petitioner's trial in the District Court during the week of September 20, 1976, did not negate or dispute the fact that Gregory Real Estate Company was an established borrower of mortgage funds at Home Savings and Loan Association, and at other lending institutions in 1972 and 1973. The record clearly shows that the convictions of petitioner on the four counts involving him arise solely because of the activity of Gregory Real Estate as a borrower of mortgage funds.

There was no claim or allegation by the United States that there was any fraud in the inducement or procurement of the five Gregory mortgage loans involved. There has been no allegation that any subterfuge, false financial information, trickery or deceit was utilized to obtain the loans. No evidence demonstrated that the loans to the Gregory company in 1972 and 1973 were made by the lending officials at Home Savings and Loan Association in disregard of sound business judgment. The United States did not negate the fact that the Gregory Real Estate Company was an established borrower at all times mentioned in the indictment.

United States v. *Britton,* 107 U.S. 655, 2 S.Ct. 512, 27 L.Ed. 520, and *United States* v. *Northway,* 120 U.S. 327, 7 S.Ct. 580, 30 L.Ed. 664, define the meaning of the term "willful misapplication" as it is used in statutory forerunner of 18 U.S.C. 656 and 657. These early cases define the criminal offense of willful misapplication as being a misapplication for the use, benefit or gain of the party charged,

and that to constitute the offense of willful misapplication there must be a conversion of the funds of the association to the use of the party charged or to some other person.

This case involves the inherently lawful activity of borrowing funds by the Gregory company. The funds of Home Savings and Loan Association were exchanged for the promissory evidence of repayment, the security instrument on the property involved, and the independent solvency of the obligor, Gregory Real Estate Company. Petitioner submits that the agreed exchange, in the absence of any fraud in the procurement or in the loan documents, results in the funds being those of the borrower and not the association. Therefore, any alleged conversion by the debtor of the association's funds is inherently and legally impossible. *Evans* v. *United States,* 153 U.S. 584, 14 S.Ct. 934, 38 L.Ed. 830.

The United States relied heavily in the Circuit Court of Appeals on the case *United States* v. *Iannelli,* 2 Cir. 461 F.2d 483, but that case is clearly distinguishable for it involved fraud in the procurement of the loan, fraud in the loan documents, including a fictitious loan application and dubious solvency of the applicant. The *Iannelli* case thus involved clear manipulation of the bank's "funds" and thus a conversion within the meaning of the statute.

The decision of the Fourth Circuit Court of Appeals (Appendix 1(a)) is in obvious conflict with First Circuit decision of *United States* v. *Gens,* 493 F.2d 216, and the Second Circuit decision in *United States* v. *Docherty,* 468 F.2d 989. The First and Second Circuits decided misapplication cases under 18 U.S.C. 657 with controlling reliance placed on the financial capabilities of the named borrower and by the borrower's recognition of his obligation for repayment. These decisions correctly indicate that loans can be classified as "sham" or "dummy" where there exists little likelihood or expectation that the named debtor or borrower would repay. Further, the participation of bank officials in such loans would have a "natural tendency" to injure or defraud the bank and thus constitute willful misapplication within the meaning of the statute. On the contrary, these decisions clearly hold that where the debtor is financially capable and understands his responsibility for repayment, the loan cannot be classified as sham or dummy even if bank officials know the debtor will turn the proceeds over to a third party. *United States* v. *Gens, supra,* 463 F.2d 216 at 222.

Petitioner's convictions on the conspiracy count and the three substantive counts were approved by the United States District Court without opinion and by the United States Court of Appeals in a per curiam opinion.These courts were unpersuaded by the substantial net worth of the Gregory Real Estate Company which at all material times remained in excess of $300,000.00. There could have been no reliance on the theory that Gregory Real Estate was a weak or marginal borrower with dubious credit. The evidence of the United States itself effectively negates any such suggestion. Government Exhibit 22, the minute book of the Board of Directors meetings of Home Savings and Loan Association, is replete with convincing evidence that the Gregory company was a long standing and successful borrower of real estate mortgage funds both before and after the loans that became the petitioner's nexus to this prosecution. Moreover, there was never any assurance from the lending officials at Home Savings and Loan Association that the Gregory firm would not be called upon for repayment of the mortgage loans. Thus, the decision of the Fourth Circuit Court of Appeals is in obvious conflict with the decisions of other Circuits on the important question of the type of borrowing activity that may constitute willful misapplication within the purview of 18 U.S.C. 657.

Moreover, the substantive statutes, 18 U.S.C. 657 and 1006 require the establishment of the specific element of intent to injure or defraud. See *United States* v. *Britton, supra,* and *Evans* v. *United States, supra;* also *United States* v. *Arthur,* 544 F.2d 730 where the word "injure" was held to mean "to intend pecuniary loss." In the District Court, the Petitioner did not take the stand in his own defense but relied on the objective facts of the five real property mortgage loans to negate any intent to injure or defraud. The written obligation to repay the debt in the form of the negotiable Notes, the valid first mortgage security instruments, the conveyance of the land and improvements as additional security, and the objective net worth of the Gregory company are facts that confirm Gregory's intention to honor the debt. See *Evans* v. *United States, supra,* where this Court said that the element of intent really depends upon the question of whether there was, at the time of the transaction, a deliberate purpose on the part of the defendant to defraud the bank. *Evans* v. *United States, supra,* 38 L.Ed. 830 at page 833. It is respectfully submitted that the jury's verdict cannot stand in the absence of substantial evidence to support it. *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The other substantive count on which Petitioner's conviction has been affirmed is based on the described "Contractors' Affidavit" that was executed by Gregory Real Estate Company on November 13, 1972, in connection with the large development loan of Count Two. It has been held that the execution of this document is a false entry by Petitioner within the purview of Title 18 U.S.C. section 1006. See Government Exhibit 32A. (At. A. 361) It is manifest that the purpose of this document was not to certify the identity of the contractor but to afford the lending institution additional evidence that suppliers, materialmen, and mechanics who may have improved the real property covered by the first mortgage security instrument had been paid. The lien waiver affidavit was part of the closing documents and was never intended to be a statement of who the contractor "was to be."

The ambiguity of the document itself reveals that the contractor's identity lacked the capacity to deceive required by 18 U.S.C. 1006. The contractor and owner are not usually identical; nevertheless, this document was designed for execution by the contractor or owner. (See Government Exhibit 32A) Moreover, no reason existed to conceal the existence of C. Paul Roberts as a builder. The United States predicated this entire prosecution on Roberts' lack of capacity as a borrower, not his lack of capacity as a builder. Not only was there no false signature on the affidavit itself but it further correctly represented what it was designed to represent, that sub-contractors and suppliers had been paid. No trickery or fraud could have been intended. See *United States* v. *Snider,* 502 F.2d 645; also, *United States* v. *Crowley,* 522 F.2d 427, a prosecution under 18 U.S.C. sec. 1006 where a bank appraiser substituted his name for the real appraiser. It was held that the authorship of the appraisal was vital since the appraiser's qualifications and competence were required by precise federal regulations. It is clear that no such compelling requirements existed in connection with this affidavit. Petitioner submits that in the circumstances of this case the document itself is not within the ambit of the statute and that there is no evidence of intent to injure or defraud. See *Glasser* v. *United States, supra; United States* v. *Arthur, supra.*

Further, the evidence that was admitted against petitioner on the conspiracy count as well as the District Court's charge to the jury were predicated on the premise that there was but one conspiracy alleged and proven. An existing

variance became prejudicial to Petitioner's fundamental right to a fair trial when the District Court allowed a mass of irrelevant evidence and charged the jury on the basis of a single conspiracy.

The essence of the offense of conspiracy as defined by 18 U.S.C. 371 is agreement to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States* v. *Falcone,* 311 U.S. 205, 85 L.Ed. 128, 61 S.Ct. 204. Conspiracy is a crime of intent, and for intent there must be knowledge. *Blumenthal* v. *United States,* 332 U.S. 539, 92 L.Ed. 154, 68 S.Ct. 248. The activity of borrowing by the Gregory Real Estate Company is not an inherently illegal endeavor. The record is devoid of evidence that Petitioner knew at any time that he might be violating the law.

The record is replete with evidence of fraudulent loans not involving petitioner that were approved by the officials of Home Savings and Loan Association. A series of fraudulent loans were approved with false employment information having been inserted by an employee of C. Paul Roberts on three $32,000.00 loans for Jerry M. Davis, two $32,000.00 loans for Donald Gene Roberts, and three $32,-000.00 loans for Timothy E. Oates. Testimony concerning the false employment information on the loans and the indiscriminate endorsement of disbursement checks under said loans by an employee of Paul Roberts was admitted into evidence over Petitioner's objections. (At. A. pp. 177, 178, 180)

In *Kotteakos* v. *United States,* 326 U.S. 711, 90 L.Ed. 1557, 66 S.Ct. 1239, one Simon Brown was the key figure in a series of fraudulent loan applications. In *Kotteakos* no conspirator, except for Brown, was interested in whether any loan except his own went through. The government conceded that the pattern was "that of separate spokes meeting

at a common center." The trial judge had charged the jury on the basis of the single conspiracy alleged in the indictment. In reversing the Second Circuit, this Court discussed at length the prejudice that resulted from the trial judge's failure in his instructions to recognize the variance so that the jury had been permitted to weigh incompetent evidence in the determination of each defendant's guilt.

The record in this case establishes the admission of a great volume of documentary and extra-judicial testimony that was admitted against the petitioner on the theory that he was a co-conspirator with the other loan applicants. The initial loan in July of 1972 from Home Savings and Loan Association to Homeco, Inc. in which loan proceeds in excess of the purchase price were available to pay development bills incurred by C. Paul Roberts is the first example of conspiracy with which petitioner could not have been related. Further, the use by C. Paul Roberts of his relatives, particularly his son and son-in-laws to obtain fraudulent loans with the knowledge of officials at Home Savings and Loan Association consumed a great amount of time during the week long trial of petitioner. Also admitted into evidence was the reciprocal seven and seven agreement between officials at Home Savings and Loan Association and other officers at Mutual Savings and Loan Association. The petitioner was not connected in any way with these transactions.

It is submitted that the officials of Home Savings and Loan Association and C. Paul Roberts, the developer, comprise the "hub" of what can be classified as a "circle" conspiracy. Although the hub may view its dealings with each spoke as part of a single large enterprise, the spoke is ordinarily concerned only with his own transaction or transactions which in petitioner's case consisted of the inherently legal activity of borrowing mortgage funds. There is no evidence in this case that petitioner conspired with other

"spokes" or even that their existence was known to him. See *United States* v. *Canella,* 157 F.2d 470, 9 Cir.; also, *Blumenthal* v. *United States,* 332 U.S. 539, where a retail seller of whiskey knew that the hub wholesaler had received an entire carload, which was far more than he himself had bought.

The multiple conspiracy cases following *Kotteakos, supra,* are based on the assumption that there exists a conspiracy between each spoke and the hub, a situation not established by the record in this case. Petitioner's situation is less than that of respondents in *United States* v. *Falcone,* 311 U.S. 205, *supra,* who were engaged in a normally lawful activity. In the *Falcone* case there was some knowledge on the part of respondents that their supplies would be used in an unlawful activity. In the instant case there is no evidence that petitioner knew that the inherently lawful activity of his company would involve him in a criminal enterprise.

The focus in *Kotteakos* on the prejudice resulting from the trial court's failure to recognize the variance in its instructions and in the admission of irrelevant evidence should apply with more compelling force in a case such as this where the defendant's connection with the conspiracy is so tenuous. In speaking of conspiracy prosecutions, the *Kotteakos* decision said this at page 1253 of the opinion in 66 S.Ct.:

> "The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere . . . , extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possibe, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

The foregoing is precisely the error that occurred at petitioner's trial. The District Court's charge to the jury was predicated entirely on the existence of one overall plan or scheme. The admission of evidence of twenty-seven other loans, many admittedly fraudulent, where the borrowers were not even defendants at the trial, effectively destroyed any probability that this Petitioner received a fair trial. Moreover, the totality of this evidence admitted against Petitioner conclusively establishes the existence of multiple conspiracies in the context of the "circle" shown by the record.

It is respectfully submitted that petitioner's convictions under the circumstances shown by the record in this case should be reversed. An irreparable loss of freedom has been sanctioned by the District Court and the Court of Appeals without opinion. If the force of *Kotteakos* applies to admitted conspiracies, every reason exists here for the applicability of its rationale.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October, 1977

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1108

United States of America,

Appellee,

v.

Walter J. Dozier,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham.
Eugene A. Gordon, Chief Judge.

(Argued July 13, 1977 Decided August 1, 1977.)

Before Bryan, Senior Circuit Judge, Winter and Butzner, Circuit Judges.

T. Wilson Hotze, Jr. for Appellant; N. Carlton Tilley, Jr. and Allen H. Gwyn, Assistant United States Attorneys (Benjamin H. White, Jr., United States Attorney on brief) for Appellee.

Per Curiam:

Walter J. Dozier was indicted on four of the 17 counts of an indictment returned against six defendants[1] for their

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[1] Other defendants, C. Paul Roberts, Walter A. Biggs, C. Thomas Biggs and Thomas C. Upchurch, officers and directors of Home Savings and Loan Association, entered guilty pleas to at least one count. The fifth other defendant, John S. Stewart, President and a director of Mutual Savings and Loan, pleaded not guilty, and separately, went to trial.

defrauding, and causing the defrauding, of two savings and loan associations in Durham, North Carolina. Dozier was convicted September 24, 1976 on count 1, of conspiring to misapply funds and make false entries, 18 USC 371, 657[2] and 1006[3]; on counts 2 and 3, of misapplication of moneys, 18 USC 657; and on count 11, of making and causing false entries and statements to be made, 18 USC 1006. He was sentenced on counts 1 and 2 to three years imprisonment and fined $5,000; on the remaining counts 3 and 11, a sentence of two years each, to run concurrently with the prison sentences imposed on counts 1 and 2, plus a fine of $5,000.

Appealing, Dozier assigns as error: (1) a prejudicial variance between the single-conspiracy indictment and the evidence disclosing multiple conspiracies; (2) the legal insufficiency of the evidence to sustain the verdict; (3) the reading of the wrong indictment to the jury and permitting

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[2] This section reads in pertinent part:

> "Whoever, being an officer, agent or employee of or connected in any capacity with... [any] savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, . . . and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

[3] As relevant here, this section follows:

> "Whoever, being an officer, agent or employee of or connected in any capacity with . . . [any] savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, . . . with intent to defraud any such institution, . . . makes any false entry in any book, report or statement of or to any such institution, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

the jury to have the indictment during its deliberations; and (4) the receipt of inadmissible evidence.

After considering each of these assignments of error in the light of the record and the evidence, as well as upon the arguments of counsel, on brief and orally, we find them unsustained. The judgments on appeal should not be disturbed.

Affirmed.

JUDGMENT

Filed August 1, 1977

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1108

United States of America,

Appellee,

versus

Walter J. Dozier,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1108

United States of America,

Appellee,

versus

Walter J. Dozier,

Appellant.

ORDER

Filed September 7, 1977

Upon consideration of the appellant's petition for rehearing, by counsel,

It Is Ordered that the petition for rehearing be, and it is hereby, Denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Winter, and Judg Butzner.

For the Court,
/s/ William K. Slate, II
Clerk

No. 77-522

In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER J. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
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INDEX

CITATIONS

Cases:

Statutes:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1977. A petition for rehearing was denied on September 7, 1977. A petition for a writ of certiorari was filed on October 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's convictions.

2. Whether the evidence established the existence of a single conspiracy.

STATUTES INVOLVED

The relevant provisions of Title 18 of the United States Code are set forth at Pet. 2-5.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conspiring to misapply federally-insured funds and to make false entries in violation of 18 U.S.C. 371 (Count I); of willful misapplication of federally insured funds in violation of 18 U.S.C. 657 and 2 (Counts II and III); and of making a false entry on the reports and records of a federally insured savings and loan association, in violation of 18 U.S.C. 1006 and 2 (Count XI).[1] Petitioner was sentenced to three years' imprisonment and fined $5,000 on Counts I and II, sentenced to two years' imprisonment and fined $5,000 on Counts III and XI, the sentences to run concurrently (Pet. 6). The court of appeals affirmed (Pet. App. 1-3).

The government's evidence showed that at the time in question petitioner's co-defendant, C. Paul Roberts, a land developer and general contractor, was approaching his maximum borrowing limit at Home Savings and Loan Association of Durham, North Carolina (the "Association").[2] Petitioner was shown to have conspired with

[1]Petitioner was one of six defendants charged in a 17-count indictment (see Pet. 5-6).

[2]A Federal Home Loan Bank Board regulation provides that an individual or a company in which that individual is a ten percent or more owner can borrow only a certain amount, depending upon the total savings or reserves of the association. At this time the Association's limit was approximately $7,000,000 to one company or group of companies owned or controlled by one individual. Roberts was approaching that limit during this period (Tr. 107-108).

Roberts and certain officers of the Association in a scheme in which various straw borrowers—including petitioner—acquired on Roberts' behalf Association loans in excess of Roberts' borrowing limit. Petitioner was also shown to have made a false entry on an affidavit in connection with one of these loans.

In July of 1972, at Roberts' urging, Homeco (a wholly-owned subsidiary of the Association) purchased a tract of land in Durham (known as the "DICO" property) with the proceeds of an Association loan (Tr. 77-78, 83-84, 87, 147).[3]

Roberts then arranged through an officer of the Association to allow Gregory Real Estate Company, a corporation owned by petitioner, to build single-family units on one section of the property (Tr. 83, 296-298). On the basis of a loan application that petitioner signed as president of Gregory Real Estate, the Association loaned $1,200,000 to Gregory Real Estate for the purchase of the property and the construction and development of approximately 300 residential home sites. On the same day the $1,200,000 loan was made, petitioner, as president of Gregory Real Estate, signed a contractor's lien waiver affidavit, which the Association required before the loan could be closed. The affidavit falsely represented Gregory Real Estate as both owner and contractor for the project, when in fact Roberts was the true owner and contractor (Tr. 300, 353). This action constituted the basis for Count XI.

Petitioner thereafter misapplied loan funds he received from the Association by channeling them to Roberts for his use in the development of the single-family units on

[3]The proceeds of this loan were used not only for the purchase by Homeco of this land, but also to pay surveying and engineering work done on the property for Roberts (Tr. 306-309).

the DICO property. This action formed the basis for Count II. Between November 13, 1972, and August 2, 1973, disbursements in the amount of $344,388.50 were made by the Association to petitioner's company, Gregory Real Estate. Petitioner, however, merely acted as a conduit for transfer of these funds from the Association to Roberts. Petitioner endorsed these disbursements checks for Gregory Real Estate and then deposited them at a bank, where they were used to purchase money orders, which were in turn deposited into accounts held by either Roberts himself or various corporations identified as Roberts' companies (Tr. 353-358). For example, $196,700 was traced to the account of Triangle Nursing Home, a Roberts company in no way involved in the development of the single-family dwellings. Of the total amount disbursed between November 1972 and August 1973, only $22,000 was traced into the Gregory Real Estate account (Tr. 309-311, 354-355, 356-362, 678-679).

3. In addition to this transaction, petitioner and others misapplied further loans from the Association—ostensibly made to persons other than Roberts—by transferring the loan proceeds to Roberts to develop another portion of the DICO property. This second part of the development of the DICO property involved the construction of 34 four-unit apartment houses. Roberts, doing business as "Empire Properties," was to be the general contractor and developer. In March 1973, Roberts arranged with an officer of the Association for the funding of this part of the development by 27 separate loans for the construction of the apartments (Tr. 92-94). Shortly thereafter, the Association made 27 loans of $32,000 each to various persons, all of whom acted as conduits to Roberts: seven of the loans were to Gregory Real Estate, petitioner's company; twelve were to relatives of Roberts; one was to the secretary of Roberts' company, Empire Properties; five were to the President of Mutual Savings and Loan

Association of Durham, North Carolina; and two were to officers and employees of Mutual Savings and Loan Association (Tr. 97-107, 183-187).[4] These transactions were the basis for Count III.

Of the seven loans the Association made to petitioner's firm, petitioner had agreed to hold four on behalf of John Wheeler, a director of Mutual Savings and Loan Association. When construction was completed on the apartments for which these four loans had been made, they were to be conveyed to Wheeler (Tr. 105-117, 121-122). In the fall of 1973, Wheeler purchased these four apartments from Roberts; he had no dealings with petitioner or Gregory Real Estate in connection with the purchase (Tr. 276-278).

The evidence also showed that the 27 loans made in the names of Roberts' relatives and employees and in the name of petitioner's firm, Gregory Real Estate, were in fact loans to Roberts, and that the straw "borrowers" had no interest therein. The history of these loans reflects that each unit was fully financed from the proceeds of the loan made by the Association and that there was no initial investment on the part of any of the named borrowers. The records also reflect that the interest coming due during the period of the loan was subtracted from the proceeds of the loan, thus relieving the named borrowers of any obligation to pay interest during the construction period of the loan (Tr. 117-118, 158, 190, 198). The deed records to the lots upon which the apartments were to be built show that at approximately the time of their

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[4]An employee of Empire Properties testified that at Roberts' direction he filled out the loan applications for Roberts' relatives, stating that the named borrowers were employed. In fact these relatives of Roberts were full-time college students (Tr. 216-225, 245-250).

completion, the properties were transferred from the named borrowers to various other individuals. The purchasers dealt directly with Roberts and had no contact with any of the borrowers named on the records of the Association (Tr. 183-186).

ARGUMENT

1. Petitioner contends that the evidence presented at trial was insufficient to establish violations of the statutes under which he was charged.

a. Petitioner alleges that since the Gregory Real Estate Company was engaged in the lawful activity of borrowing mortgage funds, and since the funds of the Association were secured by a promissory note, by a first mortgage security instrument on the property involved, and by the solvency of Gregory Real Estate Company, there could be no conversion of the Association's funds unless the government demonstrated fraud in the procurement of the loans (Pet. 14). In particular, petitioner alleges that the decision in this case is in conflict with *United States* v. *Gens*, 493 F. 2d 216 (C.A. 1), and *United States* v. *Docherty*, 468 F. 2d 989 (C.A. 2), which held that in certain circumstances the use of "straw" borrowers to obtain funds was not a misapplication of funds.

The borrowing activity sanctioned in *Gens* and *Docherty* is, however, a far cry from the activity condemned by the Fourth Circuit in the instant case. The court in *Gens* expressly recognized that a debtor's transfer of the proceeds of a loan to a third party constitutes a misapplication when bank officials assured the debtor that they would look to a third party for repayment and "the debtor allowed only his name to be used, enabling the bank officials to grant a *de facto* loan to a third party to whom the bank was unwilling to grant a formal loan." 493 F. 2d at 22. In that circumstance the funds have been misapplied, since there is little likelihood or expectation that the named debtor will repay. Similarly, in *Docherty*, the court held only that the debtor's transfer of loan proceeds to a third party in violation of the bank's internal rules did not constitute misapplication when the debtor "knew he was putting his own credit on the line [and apparently he had] the means to repay" (468 F. 2d at 995).

The evidence in this case shows that petitioner, Roberts, and the officials at the Association clearly considered the loans to petitioner as *de facto* loans to Roberts, who was unable to obtain further loans in his own right, and that employees of the Association clearly looked to Roberts for repayment and understood Roberts was the contractor and developer of the property. Petitioner therefore knowingly aided the scheme devised by Roberts and Association officials to circumvent the maximum lending limit by making loans to petitioner, who was not expected to make repayment. Indeed, when the Association had difficulty in securing timely interest payments on the $1,200,000 loan, an officer approached petitioner and requested his assistance in persuading Roberts to bring the payments up to date (Tr. 301-302), instead of attempting to secure the payments from petitioner's company, the nominal borrower.

b. Petitioner also maintains (Pet. 16-17) that his conviction for falsifying the contractor's affidavit he executed in connection with the development loan is invalid because the purpose of the affidavit was not to certify that he was the contractor—which he clearly was not—but simply to afford the Association additional evidence that workers who had improved the property covered by the loan had been paid.

There is ample evidence, however, that petitioner aided an officer of the Association to make a false entry with the intent to deceive the officers and agents of the Association within the meaning of Section 1006. Petitioner signed the contractor's affidavit (swearing that all subcontractors and materialmen had been paid) representing that his firm was the contractor and thereby concealing from the Association's Board of Directors the fact that Roberts was the real contractor.[5] When the Vice President of the Association (who had the responsibility for seeing that the affidavit was properly executed) allowed the false and misleading affidavit to be entered in petitioner's loan file, despite his knowledge that petitioner was not the contractor, the offense under Section 1006 was complete. Since petitioner certainly knew he was not the contractor nor the true owner of the project, his completion of the misleading affidavit with an intent to conceal Roberts' identity as the true contractor established petitioner's participation in the making of a false entry.

2. Petitioner also contends (Pet. 17-21) that a prejudicial variance existed between the indictment and the proof—*i.e.*, although one large conspiracy was charged and evidence was admitted in accordance with this theory, the evidence in fact showed a number of smaller conspiracies. In support of this contention, petitioner analogizes his case to *Kotteakos* v. *United States*, 328 U.S. 750. In contrast to the present case, however, *Kotteakos* involved a series of fraudulent loan

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[5]Since the application concealed the fact that Roberts, who could not legally do so directly, was receiving the proceeds of the loan, there was the intent to deceive that is required for a violation under 18 U.S.C. 1006. *United States* v. *Darby*, 289 U.S. 224; *United States* v. *Crowley*, 522 F. 2d 427 (C.A. 7); *United States* v. *Beer*, 518 F. 2d 168 (C.A. 5); *United States* v. *Meyer*, 266 F. 2d 747 (C.A. 5), certiorari denied, 361 U.S. 875.

applications in which the only connection between the separate groups of defendants was their common, independent use of a certain agent to handle the loan applications—a pattern described by this Court as "separate spokes meeting in a common center * * * without the rim of the wheel to enclose the spokes." *Id.* at 755. Here the evidence demonstrated the existence of a single, comprehensive plan whereby Roberts acquired, through the use of several straw borrowers, funds to finance his development of a project he was incapable of financing himself due to the borrowing limit at the Association. The scheme devised by Roberts and certain officers of the Association enabled the Association to extend credit to Roberts for the construction of both the single and multiple-family projects in violation of federal regulations, while allowing these officials and Roberts to conceal their respective interests.

Petitioner was aware of the scope of Roberts' plans. He knew that Roberts was building the single-family project using funds loaned in petitioner's name and that, in addition to the seven apartments financed in petitioner's name, 27 other such apartments also were being built. Petitioner also knew that Roberts could not finance either phase of the project himself, and that Roberts needed other straw borrowers—in addition to petitioner—to implement his plans. Indeed, petitioner agreed to have four of the loans put in his name as an accommodation to John Wheeler. Accordingly, as this Court concluded in *Blumenthal* v. *United States*, 332 U.S. 539, 558: "[I]t hardly can be sufficient to relieve [petitioner] that [he] did not know, when [he] joined the scheme, who those people were or exactly what parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by

their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1978.